No. 90-573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ARMISTEAD HOMES CORPORATION,
Petitioner,

v.

KAREN PINCHBACK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where the trial court and Court of Appeals both found that an all-white housing cooperative with available units had an established policy against accepting black residents, that a bona fide would-be black purchaser was reliably informed of that discriminatory policy by a qualified real estate agent, that but for that policy the black purchaser would have applied for housing at the cooperative, and that had she applied she would have been rejected on racial grounds, must she nevertheless have suffered the humiliation of making a formal application to the cooperative in order to bring an action for unlawful discrimination under 42 U.S.C. §§ 1981 and 1982?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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BRIEF IN OPPOSITION

Respondent Karen Pinchback respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment of the Court of Appeals for the Fourth Circuit. The Court of Appeals upheld the liability of an all-white 1,518-unit Baltimore housing cooperative for racial segregation of a blatant and shocking type not seen in this Court since the early 1960's. In its effort to justify review by this Court, petitioner Armistead Homes Corporation (hereinafter "Armistead") misstates critical factual findings of the trial court, concurred in by the Court of Appeals, and ignores the contrary position of the United States Department

of Justice Civil Rights Division as amicus curiae below.[1] Armistead furthermore contends that the judgment below conflicts with principles of this Court, conflicts with decisions of other lower courts, represents a departure from settled principles of discrimination law, and threatens to open a floodgate for new discrimination actions. None of this is so. In fact, this case involves nothing more than the routine application of well-settled principles of discrimination law to an extraordinary and despicable instance of racial animus.

COUNTERSTATEMENT OF THE CASE

At the time this claim arose, Armistead was a whites-only community of 1,518 individual leasehold properties surrounded by black communities in Baltimore, Maryland. Armistead had never had a black member in its thirty year history. App. 14-15, 111. The Court of Appeals found Armistead's pervasive racial hostility best summarized in the comments of a former board president who remarked of this litigation, "if we don't beat this case, we'll have every nigger in Baltimore coming here." App. 117.[2] The District Court found as a fact that the foreseeable and intended consequence of Armistead's discriminatory policies was to deny respondent Karen Pinchback ("Pinchback") the opportunity to purchase a leasehold at Armistead because she is black, in violation

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[1] The Brief for the United States as Amicus Curiae is set forth in the Appendix to this brief. The United States noted in its amicus curiae brief below that in utilizing its authority to seek relief for victims of housing discrimination under Section 814 of the Fair Housing Act, 42 U.S.C. § 3614, the Department of Justice would consider an individual to be an aggrieved person if he sought housing but did not formally apply based on a reasonable belief that submitting an application would be futile in view of the discriminatory policy. App. 2a.

[2] The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 907 F.2d 1447 (4th Cir. 1990).

of the anti-discrimination provisions of 42 U.S.C. §§ 1981 and 1982 and Md. Ann. Code art. 49B. As the Court of Appeals recognized, the District Court's holding "turns on a number of specific factual findings." App. 114. For this reason, and because Armistead's statement of the case ignores significant aspects of the record below, it is necessary to consider the District Court's factual findings in greater detail.

Findings of Fact by the Trial Court

The District Court found that Armistead exercised an extraordinary level of control over leasehold transfers and the racial composition of its membership. Through its membership committee and board of directors, Armistead controls "who is, and who is not, permitted to become an Armistead leasehold owner." App. 15, 111. The membership committee visits with prospective purchasers to ensure that they are "people who will fit into the community." The board retains the absolute right to determine at its discretion whether or not a prospective purchaser will be approved for membership. App. 11-15.

During an eight-day bench trial, two former members of Armistead's governing board provided a detailed account of the board's hostility to blacks. The District Court expressly credited as true, among other evidence, the following remarkable testimony:

(1) Every Armistead board on which one witness had served (including Armistead boards between 1983-1987) "has discussed how to keep blacks out of Armistead." App. 17;

(2) At board meetings in 1975 and 1976, board members discussed their concern that posting of signs by realtors in Armistead yards would lead to blacks trying to purchase leaseholds in Armistead and therefore should be discouraged. App. 17-18;

(3) On one occasion, a board member explained that a black individual inquiring about available hous-

ing in Armistead was not told about potential financing assistance because, in the board member's words, "we don't need any niggers." App. 18-19;

(4) When one individual purchased her leasehold in 1981 (the year following Pinchback's inquiry into housing at Armistead), the individual was told at the closing by either Dailey (the listing agent for the leasehold in which Pinchback was interested) or a board member not to worry because there were "no niggers in Armistead." App. 17;

(5) One board member stated in a board meeting—in connection with this case—words to the effect that "we don't want any blacks in Armistead." Another board member voiced the same concern in a board meeting, although not in reference to this case. App. 22;

(6) On one occasion, when a member sought permission to use Armistead's recreation hall for a function which would be attended by blacks, an Armistead board member stated "that it would be over his 'dead body' that 'niggers' would be allowed to use the hall." App. 18-19;

(7) Several leasehold owners threatened the president of Armistead's board that they would sell their property to blacks, to which he responded that "they would have to go through the membership review and credit check first, clearly implying that they would not successfully do so." App. 19;

(8) "Fred James, while President of the Corporation, and Lillie May Evans, while a Board member, stated that blacks had to be kept out of Armistead." App. 22-23; and

(9) In 1984 or 1985—after Armistead had again been forcefully reminded of its fair housing obligations (through this litigation brought by Pinchback)—the then-president of the Armistead

> board stated in reference to Pinchback's suit that "if we don't beat this case, we'll have every nigger in Baltimore coming here." App. 19.

The District Court concluded on the basis of this testimony that the Armistead board had a long-standing policy of discriminating against blacks at the time Pinchback was interested in purchasing the property. App. 27, 65.

The District Court found that Pinchback first expressed an interest in securing housing at Armistead in February 1980, when she contacted a real estate agent in response to a classified advertisement for an Armistead home. In her conversation with the agent, Pinchback discussed the location, price and financing terms for the purchase and made an appointment to visit the property. App. 3-5. The District Court found that Pinchback had sufficient financial resources to complete the purchase and to make the monthly payments. App. 36-37. Before she was able to see the property, however, she had a subsequent conversation with the agent who asked whether she was black and then "bluntly informed [her] that the color of her skin precluded her from pursuing a leasehold interest at Armistead." App. 6, 64.

Armistead argues that the listing agent did not have sufficient contact with Armistead to be "reliably apprised" of Armistead's racist policy. Petition at 15. This ignores the District Court's specific factual findings that Armistead carried out its racist policy "fully aware" that local realtors visited Armistead and interacted with members, including board members; that Armistead "either directly or indirectly caused Dailey to become aware" of the racist policy,[3] with consequences which were inten-

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[3] In view of this factual finding by the District Court, Armistead's assertion "that the statements attributed to Diane Dailey by the Plaintiff had no connection with any information conveyed by Armistead to her," Petition at 9, patently misstates the trial court's finding on this issue.

tional and "quite foreseeable"; and that Dailey accurately conveyed the policy to Pinchback, a bona fide prospective leasehold buyer who reasonably regarded Dailey as a reliable information source. App. 56-61.[4]

The District Court found that Pinchback reasonably relied on the information conveyed by the listing agent and did not pursue any further her interest in purchasing at Armistead, although she did report the incident to an investigator with the Department of Housing and Urban Development, and she subsequently initiated this lawsuit. App. 6, 112. The District Court found as a fact that Pinchback would have applied to live at Armistead but for its policy of racial exclusion and that she would have been discriminated against had she applied. App. 27.

Applying these detailed factual findings to settled principles of causation embodied in the futile gesture doctrine established by this Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) ("*Teamsters*"), the District Court held Armistead liable under 42 U.S.C. §§ 1981 and 1982. The District Court also found a separate basis for liability under the "Discrimination in Housing" sections of article 49B of the Maryland Annotated Code, the state analogue to the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (1982). App. 58. In addition, the District Court found Armistead liable under the same three statutes, 42 U.S.C. §§ 1981 and 1982 and Md. Ann. Code art. 49B, § 25, on a legal ground entirely independent of the *Teamsters* futile ges-

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[4] As the United States noted below, the fact that the information source (the listing agent in this case) is a third party has no relevance. "It is the discrimination itself, and not plaintiff's knowledge of it, that must come from defendant." Nor does the manner in which the third party received his information have independent significance "once the nonapplicant establishes that she reasonably regarded the information source as reliable, thereby justifying her decision to forego applying." App. 15a & n.18.

ture doctrine—namely, that Armistead's illegal discriminatory actions were the proximate cause of the injuries suffered by Pinchback. App. 58-61.

Armistead's Appeal

Armistead appealed the District Court's judgment. On appeal, the Civil Rights Division of the United States Department of Justice, noting its major enforcement responsibilities under the Fair Housing Act,[5] submitted a brief as amicus curiae arguing that the policies underlying the application of the futile gesture doctrine apply equally to claims of nonapplicants in housing discrimination cases. Otherwise, the most entrenched forms of discrimination would go unremedied. App. 9a-11a.

On appeal, Armstead disputed the sufficiency of the evidence of discrimination. The Court of Appeals reviewed the District Court's factual findings and discerned in the detailed trial testimony of the two former board members what it euphemistically termed "a singular anxiety on the part of the board over the prospect of blacks coming into the community."[6] It was "quite clear," the Court of Appeals concluded, "that the district court correctly found a racially discriminatory policy at Armistead [which] worked primarily to deter black interest in the community from ever forming. Its effectiveness is apparent." App. 117-18.

Turning to the District Court's application of the *Teamsters* causation principles, the Court of Appeals observed that those principles have become "integral to

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[5] The Fair Housing Act is codified as Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. §§ 3601-3619.

[6] The Court of Appeals found that this "anxiety" manifested itself in discussions by the board on strategies to keep blacks out, suggestions that the board would use its screening process and veto power to reject any attempted sales to blacks, concealment of financing availability, and discussions on how to target a white audience when advertising to the community. App. 116-17.

fair employment law" and that "[f]air employment concepts are often imported into fair housing law." App. 121-22. The Court of Appeals quoted extensively from this Court's reasoning in *Teamsters*:

> A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection. . . . When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

App. 120, quoting *Teamsters*, 431 U.S. at 365-66.

The Court of Appeals found ample support in the record for the District Court's finding that Pinchback met the stringent factual requirements of a *Teamsters* claim by showing that she was a member of a racial minority who was a potential bona fide purchaser of the property with sufficient financial resources to complete the purchase; that Armistead had a policy of discrimination against people of Pinchback's race; that Pinchback was reliably informed of this policy and would have taken steps to complete the purchase but for the discrimination; and that Armistead would have discriminated against Pinchback had Pinchback submitted a formal application. App. 124-25. Accordingly, the Court of Appeals affirmed the District Court's careful fact-specific application of causation principles from *Teamsters*:

> Pinchback was not required to do more than she did. She had no need to examine the property after Dailey told her no blacks could live there for precisely the same reasons why she had no need to exercise the futility of submitting an offer. The burden of humiliation occasioned by discrimination is heavy. When one has felt it as Pinchback did here,

> we cannot require the victim to press on meaninglessly.

App. 125.[7]

REASONS THE PETITION SHOULD BE DENIED

I. The Decisions Below Reflect No More Than A Routine And Highly Fact-Specific Application Of Settled Legal Principles To Shockingly Blatant Racist Conduct.

The decisions below are completely consistent with settled principles of discrimination law adopted by this Court in *Teamsters*. The District Court methodically applied the stringent *Teamsters* requirements to its specific factual findings, including the findings concerning Armistead's pervasive hostility to blacks and its patently racist policy of segregation. Armistead does not dispute these findings,[8] and it advances no serious explanation for its contention that this Court's reasoning in *Teamsters*, as embodied in the futile gesture doctrine which is universally accepted and routinely applied to racial discrimination in the employment context, should not apply to the startling overt racial discrimination at issue

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[7] Because the Court of Appeals found the District Court's judgment to rest firmly on federal law, it concluded that a decision on Pinchback's state law claim was unnecessary "at this stage of the litigation." Accordingly, it vacated the District Court's finding of liability under state law. App. 132.

[8] Indeed, Armistead could not dispute the factual findings of the lower courts in this forum because this Court does not sit to review facts determined by two courts below. *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.14 (6th ed. 1986).

here.[9] Because *Teamsters* clearly applies in the factual circumstances of this case and was correctly applied below, no review by this Court is warranted.

As both lower courts and the United States Department of Justice recognized, the common objectives of employment and housing discrimination law compel the application of the futile gesture doctrine to the circumstances of this case. As a general matter, federal courts have given Title VII principles "wide acceptance" in housing discrimination cases. App. 54, 122-23. Indeed, as the Fourth Circuit acknowledged, the similarities between fair empoyment and fair housing statutes "have traditionally facilitated the development of common or parallel methods of proof." App. 122-23. The Department of Justice Civil Rights Division echoed this view in its amicus brief below, noting that the policy objectives and prudential concerns embodied in the employment discrimination statutes apply in the housing discrimination context as well. App. 10a-12a & n.13.

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[9] Armistead is incorrect in asserting that the application of the *Teamsters* test here would be inconsistent with previous holdings of this Court. Petition at 17-20. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), was decided twelve years before the futile gesture doctrine was recognized by this Court in *Teamsters*. Moreover, *Moose Lodge* involved a plaintiff who, unlike Karen Pinchback in this case, never evinced any interest in becoming a member and thus had no standing to litigate the constitutional issue respecting Moose Lodge's membership requirements. 407 U.S. at 166. Armistead's reliance on *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), is likewise misplaced. *Burdine* was a Title VII case by an *applicant*; no futile gesture doctrine issue was involved. Instead, the Court applied the method of proof established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ("*McDonnell Douglas*") and cautioned that this "standard is not inflexible" and "not necessarily applicable in every respect in differing factual situations." 450 U.S. 253-544 & n.6, quoting *McDonnell Douglas*, 411 U.S. at 802 n.13. As the Fourth Circuit noted below, "the *McDonnell Douglas* method of proof is irrelevant" in this case because Pinchback provided ample direct evidence of discrimination. App. 127-28.

Armistead itself concedes as much in seeking to apply here the method of proof established in *McDonnell Douglas*, an employment discrimination case. Petition at 10-11.[10]

Moreover, the policies underlying this Court's *Teamsters* analysis are fully applicable to claims of nonapplicants in housing discrimination cases where, as in *Teamsters*, the defendant's pervasive discrimination has been proved. As this Court observed in *Teamsters*:

> The denial of [civil rights claims] relief on the ground that the claimant had not formally applied . . . could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter . . . applications from members of minority groups.

431 U.S. at 367.

The District Court properly recognized that there is "no basis in principle" for distinguishing between the prospective employee who is dissuaded from applying for a job because of the discriminatory practices of an employer, and the prospective resident who is dissuaded from applying for housing because of the discriminatory practices of the seller. App. 53-54. As the United States correctly concluded in its amicus brief below, "[t]he prospective applicant for housing facing certain rejection on the basis of race is in a position directly analogous to that of the prospective employee. There is simply no meaningful way to distinguish the two situations." App. 11a. Karen Pinchback was not required to suffer the additional "humiliation of explicit and certain rejection." *Teamsters*, 431 U.S. at 365. App. 47, 125.

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[10] As the District Court noted, the futile gesture doctrine has been incorporated into the *McDonnell Douglas* analysis by at least one Court. App. 54-55 & n.10, citing *Rodgers v. Peninsular Steel Co.*, 542 F. Supp. 1215, 1218-19 (N.D. Ohio 1982).

In making this fact-specific determination, the District Court applied a rigorous standard of proof based on the *Teamsters* causation requirements. Under the *Teamsters* analysis, a nonapplicant must demonstrate that he was a potential victim of unlawful discrimination by meeting "the not always easy burden of proving that he . . . would have applied but for the discrimination and that he would have been discriminatorily rejected had he applied." 431 U.S. at 367-68 & n.52. Application of this standard necessarily turns on the particular factual circumstances of each specific case. Here, the District Court found that Pinchback satisfied these elements. App. 9-58. The Court of Appeals found ample support in the record for the District Court's conclusion. App. 125.

II. There Is No Conflict Among The Circuits.

The federal courts routinely have applied Title VII principles to housing discrimination cases, as both lower courts recognized. App. 54, 122-23. Certainly, there is no conflict among the circuits on this point.[11] Nor has any conflict developed over the application of the *Teamsters* causation requirements to circumstances such as those presented here. In fact, courts routinely have applied the *Teamsters* futile gesture doctrine in analogous employment discrimination cases to permit claims by nonapplicants who were able to demonstrate that they were deterred from applying because of discrimination and

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[11] *See, e.g., Selden Apartments v. HUD*, 785 F.2d 152, 159 (6th Cir. 1986) (*McDonnell Douglas* test applies under Title VIII, Section 1981, or Section 1982); *Asbury v. Brougham*, 866 F.2d 1276, 1279 (10th Cir. 1989); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 551 (9th Cir. 1980). *See also Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982) ("anti-discrimination objectives of Title VII"); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) ("The Supreme Court has noted the need to construe both Title VII and Title VIII broadly so as to end discrimination.").

that had they applied, they would have been discriminatorily rejected. App. 49-51, 151.[12] Thus, Armistead's suggestion of a conflict among the federal appellate courts is incorrect.[13]

III. The Fact-Specific Decisions Below Have No Widespread Applicability.

Contrary to Armistead's contention, this is not a case of widespread applicability. Fortunately, the unusual circumstances of this case do not arise frequently in the housing context. Armistead itself acknowledges that in the thirteen years since this Court's decision in *Teamsters*, only the court below has had occasion to apply

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[12] *See, e.g., United States v. Gregory*, 871 F.2d 1239, 1242 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 720 (1990); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 867 (7th Cir. 1985); *Holsey v. Armour & Co.*, 743 F.2d 199, 208-09 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985); *White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1086 (4th Cir. 1977); *McDermott v. Lehman*, 594 F. Supp. 1315, 1323 (D. Me. 1984). As the Court of Appeals observed, the doctrine has become "integral to fair employment law."

[13] Armistead relies on two lower court cases, both readily distinguishable. Petition at 19-20. *Jackson v. Dukakis*, 526 F.2d 64 (1st Cir. 1975), was a pre-*Teamsters* case in which the plaintiff was denied standing "for want of any causal connection between his alleged injuries and the defendants' actions." 526 F.2d at 668 & n.3. The District Court's factual findings in this case, unanimously concurred in by the Fourth Circuit, clearly establish Pinchback's satisfaction of this requirement, as she was denied a housing opportunity and she suffered humiliation and emotional distress directly attributable to Armistead's blatantly racist policies. App. 56-58, 113-18. Armistead also cites *Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531 (9th Cir. 1982). The court in *Gay* found that the plaintiff had not established the "necessary prerequisite" to a futile gesture doctrine claim: "a consistently enforced discriminatory policy" which discourages applicants from even attempting to apply. 694 F.2d at 546, quoting *Teamsters*, 431 U.S. at 365. Unlike the plaintiff in *Gay*, Pinchback presented ample proof of a pervasive and effective policy of racial discrimination which "worked primarily to deter black interest in the community from ever forming." App. 117-18.

the futile gesture doctrine to housing discrimination. Petition at 14-15.[14]

Armistead also asserts that the District Court's decision will invite claims by plaintiffs who are "not in a definable group" and who hear of the discriminatory policy "by rumor or newspaper article which the . . . plaintiff considers authoritative." Petition at 15-16. However, these arguments completely ignore the stringent evidentiary requirements imposed by the District Court, which entirely defuse Armistead's exaggerated concerns. The plaintiff must be a member of a racial minority against which defendant discriminated, he must be a bona fide prospective purchaser, and he must be reliably informed of the policy of discrimination. App. 124-125.[15] These factual findings required by the District Court clearly establish that Pinchback had taken every step she reasonably could have been expected to take to purchase the Armistead leasehold until she was accurately informed by the agent that further steps would be futile. Accordingly, the District Court's holding for Pinchback does not open the floodgates for future litigation.

IV. The Legal Rule Proposed By Petitioner Would Not Affect The Outcome Of This Case.

Even if this Court were to adopt the legal rule urged by Armistead in this case—that a seller may pursue a blatant policy of racial exclusion provided he is successful at deterring prospective applicants from submitting a formal (and futile) application—that rule would not change the result in this case. The District Court correctly found Armistead liable under the anti-discrimina-

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[14] Thus, even if one were to speculate that federal courts might misapply the standard of proof set forth by the court below in the manner suggested by Armistead, it is at best premature to address that hypothetical concern in the context of this case.

[15] In addition, the plaintiff must carry the heavy burden of proving, as did Pinchback below, that had he submitted a formal application, he would have been rejected because of his race.

tion provisions contained in article 49B of the Maryland Annotated Code. The District Court also imposed liability under all three statutes, 42 U.S.C. §§ 1981 and 1982 and Md. Ann. Code art. 49B, § 25, using normal rules of proximate causation entirely independent of the *Teamsters* futile gesture doctrine. App. 58-61. Noting that "courts routinely borrow from common law tort principles in fleshing out the civil rights statutes," App. 59 (citing *Curtis v. Loether*, 415 U.S. 189, 195-96 (1974)), the Court expressed "no doubt" in concluding that Pinchback's injury was a foreseeable and intended consequence of Armistead's policy of racial exclusion. App. 58-61. Under the particular facts of this case, either of these two independent bases would support a judgment favoring Pinchback.

The Court will grant certiorari "only when there are special and important reasons therefor." Sup. Ct. R. 10.1. The District Court's fact-specific application of the stringent *Teamsters* standard of proof to the uniquely shocking and pernicious racism of Armistead, unanimously affirmed by the Court of Appeals, clearly does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2117

KAREN PINCHBACK,
Plaintiff-Appellee
v.

ARMISTEAD HOMES CORPORATION,
Defendant-Appellant

Appeal from the United States District Court
for the District of Maryland

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has major responsibility for the enforcement of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. 3601 *et seq.* The Secretary of Housing and Urban Development and the Attorney General are charged with responsibility for administering and enforcing the Act. See 42 U.S.C. 3608, 3614. Although this housing discrimination case is brought under 42 U.S.C. 1981 and 1982, and not under the Fair Housing Act, the same elements must be established in a housing discrimination action where intentional discrimination is alleged, whether brought un-

der the Act or under Sections 1981 and 1982. See, *e.g.*, *Selden Apartments* v. *HUD*, 785 F.2d 152, 159 (6th Cir. 1986) (collecting cases).[1] In light of this overlap, the decision in this case will likely affect the government's enforcement responsibilities. Indeed, in utilizing its authority to seek relief for victims of housing discrimination under Section 814 of the Act, 42 U.S.C. 3614, the Department of Justice would consider an individual to be an aggrieved person if he sought housing but did not formally apply because he reasonably believed it would be futile in view of a discriminatory policy.

QUESTION PRESENTED

Whether an individual who seeks housing but does not formally apply because he reasonably believes it would be futile is a victim of the discrimination that discouraged his application, and thus has a cause of action under 42 U.S.C. 1981 and 1982.

STATEMENT OF THE CASE

1. In February 1980, plaintiff, a black woman, read a classified advertisement in a Baltimore newspaper for the sale of a house. She called the number listed in the advertisement, which was for a real estate agency, and left a message. The following day an agent, Diane Dailey, returned plaintiff's call, and they arranged to meet so

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[1] The contstruction given the scope of Section 1981 in *Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363 (1989), is inapposite to this case. First, as to plaintiff's Section 1981 claim, the issue here is clearly the "formation" of a "contract." Further, the Court made clear in *Patterson* that, with respect to *how* a Section 1981 claim is proved, Title VII disparate treatment law provides the appropriate "scheme of proof." *Id.* at 2377-2378. Thus, *Patterson* provides support for the Court's established practice of interpreting Section 1981 and 1982 similarly to Title VIII. Finally, plaintiff here also makes a Section 1982 claim, and the "contract" language does not appear at all in this statute.

that plaintiff could see the house (689 F. Supp. at 542-543; App. 310-311).[2]

Plaintiff missed the appointment and called the agent to make a new arrangement to see the house. During this conversation the agent asked plaintiff whether she was black. When plaintiff responded that she was, the agent told her that it was the policy of the housing development, Armistead Gardens, not to allow blacks to live in the community (689 F. Supp. at 543; App. 312).[3] As a result, plaintiff did not further pursue purchasing the house (*Ibid.*).

On May 27, 1981, plaintiff filed suit against the cooperative and others, alleging that they discriminated against her on the basis of race in the sale of housing by depriving her of a residence in Armistead Gardens.[4] Plaintiff alleged causes of action under the Fair Housing Act (42 U.S.C. 3604), 42 U.S.C. 1981 and 1982, and Maryland state law. The Fair Housing Act claim, however, was dismissed based on the statute of limitations (689 F. Supp. at 542 n.2; App. 310 n.2; see also App. 49). After a bench trial, the court found that the cooperative discriminated against the plaintiff on the basis of race in the sale of housing, and was liable under Sec-

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[2] Since we address only the legal issue whether a nonapplicant may have a cause of action for housing discrimination under 42 U.S.C. 1981 and 1982, we will simply summarize the underlying facts as found by the district court. *Pinchback* v. *Armistead Homes Corp.*, 689 F. Supp. 541 (D. Md. 1988). The opinion is contained in the parties' Joint Appendix ("App."), pages 309-350.

[3] Armistead Gardens is a cooperative housing development. Residents are "members" of the cooperative and own a leasehold interest in their property. The cooperative owns the real estate. The cooperative does not directly assist members in the sale of their leasehold interests, but a prospective buyer may become a member only with the approval of the cooperative's Board of Directors (689 F. Supp. at 544-545; App. 314-317).

[4] When the case proceeded to trial, the cooperative was the only active defendant (see 689 F. Supp. at 542; App. 309-310).

tions 1981 and 1982 as well as state law (689 F. Supp. at 554; App. 344).

2. The court recognized that plaintiff never applied for housing at the cooperative. Based on testimony given at trial, however, the court found that the cooperative had a policy of discrimination against blacks and that, had plaintiff applied to live at the cooperative, she would have been denied membership because she is black.[5] The court thus found that the cooperative was liable under the "futile gesture" or "futile act" theory enunciated in *Teamsters* v. *United States*, 431 U.S. 324 (1977), a Title VII case (689 F. Supp. at 553-554; App. 341-344).[6] As the court noted, this theory "has been employed by numerous courts in employment discrimination cases to grant nonapplicants applicant status where the nonapplicant can demonstrate that he was deterred from applying because of discrimination and that had he applied, he would have been discriminatorily rejected" (689 F. Supp. at 552; App. 339).

Although the court recognized that it was a question of first impression whether the *Teamsters* theory is ap-

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[5] The court based this conclusion largely on the testimony of two Armistead members who had also served on the Board of Directors (689 F. Supp. at 545-548; App. 317-326). The court noted, for example, that one former board member testified that every board she had been on discussed how to keep blacks out of the development (689 F. Supp. at 545; App. 318-319). The court noted that another board member testified that at a number of board meetings members stated their opinions about keeping blacks from becoming leasehold owners (689 F. Supp. at 546; App. 321). Finally, the court noted that there had never been a black member of the cooperative, even though the development bordered several black neighborhoods (689 F. Supp. at 545; App. 317).

[6] The court also found the cooperative liable under a "proximate cause" theory, which analogized plaintiff's claim of intentional discrimination to a claim of an intentional tort (689 F. Supp. at 554-555; App. 344-346). We do not address whether defendant was properly found liable under this theory.

plicable to housing discrimination cases, the Court concluded that it could see "no basis in principle for distinguishing between the prospective employee who claims he was dissuaded from applying for a job because of the discriminatory practices of an employer, and the prospective resident who claims he was dissuaded from applying for housing because of the discriminatory practices of the seller of the housing" (689 F. Supp. at 553 (footnote omitted); App. 341-342). The court also noted the wide acceptance of other Title VII principles of proof in housing discrimination cases, particularly the adoption of the *McDonnell Douglas* test for establishing a prima facie case (689 F. Supp. at 553; App. 342).

In applying the futile act theory, the court reiterated the two-part test set forth in *Teamsters* that a nonapplicant must meet to establish that he was a potential victim of discrimination: (1) "that he would have applied but for the discrimination," and (2) "that he would have been discriminatorily rejected had he applied" (689 F. Supp. at 552 (quoting *Teamsters* v. *United States*, 431 U.S. at 368 n.52); App. 338-339). Having concluded that had plaintiff applied she would have been discriminatorily rejected, the court addressed the first part of the test. The court found that plaintiff "was a bona fide buyer at the time she inquired about the leasehold interest for sale at Armistead" (689 F. Supp. at 549-550; App. 331). The court then stated that the crucial inquiry was whether plaintiff was justified in foregoing applying to the cooperative (689 F. Supp. at 554; App. 343-344).

The court recognized that plaintiff did not hear about the cooperative's "no-black policy" from the cooperative, but learned about it solely from the real estate agent (689 F. Supp. at 554; App. 343).[7] The court thus stated

[7] The court further found that the real estate agent was neither an actual nor apparent agent of the cooperative (689 F. Supp. at 550-551; App. 332-335).

that "[t]he critical question is whether [the real estate agent] was reasonably regarded by Pinchback as a reliable information source, thereby justifying Pinchback's decision to forego applying to Armistead Gardens" (689 F. Supp. at 554; App. 343-344). The court concluded that since the real estate agent was the listing agent for the property and, from plaintiff's perspective, the "sole person to contact regarding the advertised property, * * * [she] was someone whom Pinchback could naturally be expected to rely on for information regarding a discriminatory housing policy at Armistead" (689 F. Supp. at 554; App. 344). The court thus found that plaintiff had met her burden of establishing that she would have applied but for the discrimination.

SUMMARY OF THE ARGUMENT

In most actions alleging intentional discrimination, a member of a protected class has applied for a position or opportunity and been rejected, allegedly on the basis of the protected status. In some instances, however, a prospective applicant may be deterred from formally applying after learning that it would be futile because of a discriminatory policy. In these instances, the issue arises whether the nonapplicant has been the victim of the discrimination that discouraged her application.

In employment discrimination cases since the Supreme Court's decision in *Teamsters* v. *United States*, 431 U.S. 324 (1977), courts have consistently held that under the futile act theory a nonapplicant does indeed have a cause of action for intentional discrimination. In the instant case, the district court correctly concluded that the futile act theory is applicable in housing discrimination cases. Other courts in housing discrimination cases have, of course, borrowed related principles from Title VII cases, including the *McDonnell Douglas* test for a prima facie case of discrimination. Here, the prospective applicant for housing facing certain rejection on a discriminatory basis is in a position directly analogous to that of the

prospective employee. Thus, if the prospective housing applicant reasonably believes that her application would be futile, she is a victim of the discrimination that deterred her application.

The district court also properly articulated the elements of proof under the futile act theory. As in the employment cases, to establish that she was a potential victim of discrimination the nonapplicant must prove that she would have applied but for the discrimination, and that had she applied she would have been discriminatorily rejected. Under the first part of this test, the crucial inquiry is whether the nonapplicant was justified in believing that her application would have been futile. Where, as here, the plaintiff received her information concerning the defendant's discriminatory practices from a third party, the plaintiff must establish that the third party could reasonably be regarded as reliable. Under the second part of the test, the court must examine the evidence to determine whether the defendant discriminated against blacks.

ARGUMENT

AN INDIVIDUAL WHO SEEKS HOUSING BUT DOES NOT FORMALLY APPLY BECAUSE SHE REASONABLY BELIEVES IT WOULD BE FUTILE IS A VICTIM OF THE DISCRIMINATION THAT DICOURAGED HER APPLICATION, AND THUS HAS A CAUSE OF ACTION FOR HOUSING DISCRIMINTION

A. *The District Court Correctly Concluded That the Futile Act Theory Applies to Housing Discrimination Cases*

1. The futile act theory derives from the Supreme Court's decision in *Teamsters* v. *United States*, 431 U.S. 324 (1977), a Title VII case. In that case, the United States brought suit against a trucking company and a union alleging, in part, that the company discriminated

against blacks and other minorities by refusing to recruit, hire, transfer, or promote them on an equal basis with whites, particularly with respect to the more desirable "line-driving" positions. After affirming the findings that the company engaged in systematic and purposeful employment discrimination, the Supreme Court addressed the proper remedial scheme, including the propriety of relief for those class members who did not apply for line-driver positions. The Court held that "an incumbent employee's failure to apply for a job is not an inexorable bar to an award of retroactive seniority." *Id.* at 364.

The Court began its analysis by noting that "a primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees." *Ibid.* The Court then stated:

> The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.
>
> * * * When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

Id. at 365-366.

The Court in *Teamsters* went on to discuss the elements of the nonapplicant's burden of proof. The Court stated, "A nonapplicant must show that he was a potential victim of unlawful discrimination. Because he is necessarily claiming that he was deterred from applying

for the job by the employer's discriminatory practices, his is the not always easy burden of proving that he would have applied for the job had it not been for those practices." *Id.* at 367-368. The Court elaborated that the nonapplicant had to meet a two-part test: (1) "that he would have applied but for the discrimination," and (2) "that he would have been discriminatorily rejected had he applied." *Id.* at 368 n.52. The Court noted that when this test is met "the nonapplicant is in a position analogous to that of an applicant." *Id.* at 368.[8]

2. Although *Teamsters* addressed the claims of nonapplicants in a remedial context, the theory that nonapplicants may, in appropriate circumstances, stand on equal footing with applicants has been widely applied to determine liability. There is, of course, no logical reason whatsoever to draw a distinction between the remedial and liability inquiries in this regard. Thus, in *United States* v. *Gregory*, 871 F.2d 1239, 1242 (4th Cir. 1989), this Court applied the theory to sustain an action. Paraphrasing *Teamsters*, the Court stated that "when an employer's discriminatory policy is known, subjecting oneself to the humiliation of explicit and certain rejection is not required to make out a case of discrimination." *Ibid.*[9] See also *Lams* v. *General Waterworks Corp.*, 766 F.2d 386, 393 (8th Cir. 1985) (court cites *Teamsters* in finding employer liable even though plaintiffs did not apply for promotions).

Similarly, courts have expressly recognized that the *McDonnell Douglas* test for establishing a prima facie case of employment discrimination need not be strictly

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[8] In *Teamsters*, the Court remanded the issue of the nonapplicants' claims for a determination of whether each individual could meet the required burden of proof. 431 U.S. at 371.

[9] This Court has also applied *Teamsters* in a remedial context. *White* v. *Carolina Paperboard Corp.*, 564 F.2d 1073, 1086 (4th Cir. 1977).

applied, and that a nonapplicant can meet his initial burden by meeting the requirements set forth in *Teamsters*.[10] For example, in *Babrocky* v. *Jewel Food Co.*, 773 F.2d 857, 867 (7th Cir. 1985), the court stated that the lower court erred "by applying the *McDonnell Douglas* framework too literally when it rejected * * * plaintiffs' claims because they had never formally applied for meatcutter positions." See also *Rodgers* v. *Peninsular Steel Co.*, 542 F. Supp. 1215, 1218 (N.D. Ohio 1982) (although plaintiff did not apply for the position, "this does not necessarily doom plaintiff's claim. The Supreme Court has established an alternative prima facie case for non-applicants.").[11]

3. The policies underlying application of the futile act theory in Title VII cases apply equally to claims of nonapplicants in housing discrimination cases. As the Supreme Court noted in *Teamsters*, the futile act theory is based on the recognition that the effects of discriminatory employment practices "are not always confined to those who were expressly denied a requested employment opportunity." 431 U.S. at 365. Since the prospect of discrimination can deter job applicants, where a non-

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[10] The *McDonnell Douglas* test—generally used where there is an absence of direct evidence in order to determine whether an inference can be drawn that an employment decision was based on reasons prohibited by Title VII, see *Teamsters* v. *United States*, 431 U.S. at 358 & n.44—requires the plaintiff to produce evidence that (1) he is a member of a protected class; (2) he applied for and was qualified for the opening; (3) he was rejected; and (4) after he was rejected, the position remained open and the employer continued to seek applicants. *McDonnell Douglas* v. *Green*, 411 U.S. 792, 802 (1973). The Court in *McDonnell Douglas* emphasized that the elements of the prima facie case may vary depending on the facts of the particular case. *Id.* at 802 n.13.

[11] Further, although *Teamsters* was a pattern or practice case, the theory has been widely applied in cases by individual litigants. See, *e.g.*, *Babrocky* v. *Jewel Food Co.*, *supra*; *Lams* v. *General Waterworks Corp.*, 766 F.2d 386, *supra*; *Burkey* v. *Marshall County Bd. of Educ.*, 513 F. Supp. 1084, 1097 (N.D.W. Va. 1981).

applicant has demonstrated that in view of the defendant's discrimination it would have been futile to apply, there is no reason to treat the nonapplicant differently from the rejected applicant. Both are victims of discrimination,[12] and recognition of the nonapplicant's claim serves the board prophylactic purposes of Title VII. See *Teamsters*, 431 U.S. at 364.

Moreover, recognition of a nonapplicant's claim avoids the possibility that the most entrenched forms of discrimination will go unremedied. As the Court in *Teamsters* stated:

> The denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups. A *per se* prohibition of relief to nonapplicants could thus put beyond the reach of equity the most invidious effects of employment discrimination—those that extend to the very hope of self-realization.

Id. at 367.

The same policy objectives are present in the housing context as well. The prospective applicant for housing facing certain rejection on the basis of race is in a position directly analogous to that of the prospective employee. There is simply no meaningful way to distinguish the two situations. Thus, in housing, as in em-

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[12] See also *Berkman* v. *City of New York*, 705 F.2d 584, 594 (2d Cir. 1983) ("Those who have been deterred by a discriminatory practice from applying for employment are as much victims of discrimination as are actual applicants whom the practice has caused to be rejected.").

ployment, the nonapplicant who as a result of discriminatory practices is deterred from applying for housing is a victim of discrimination no less than the applicant. Moreover, as the district court noted (689 F. Supp. at 553; App. 342), courts in housing discrimination cases have widely adopted the *McDonnell Douglas* test as the starting point for determining whether the plaintiff has established a prima facie case of housing discrimination. Further, courts have done so regardless of whether the housing discrimination action was based on the Fair Housing Act, Section 1981, or Section 1982. See, *e.g.*, *Selden Apartments* v. *HUD*, 785 F.2d 152, 159 (6th Cir. 1986) (same prima facie test applies under Title VIII, Section 1981, or Section 1982); *Asbury* v. *Brougham*, 866 F.2d 1276, 1279 (10th Cir. 1989) (*McDonnell Douglas* test applies to claims under both Fair Housing Act and Section 1982); *Phiffer* v. *Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 551 (9th Cir. 1980) (*McDonnell Douglas* test applies to action under Section 1982). These cases indicate the propriety of specifically applying Title VII principles to determine the elements of a prima facie case of intentional housing discrimination and, of course, the futile act theory relates to the prima facie case.[13]

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[13] Courts have widely recognized that "the anti-discrimination objectives of Title VIII are parallel to the goals of Title VII." *Smith* v. *Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982). Thus, the Fair Housing Act, like Title VII, is to be interpreted broadly. See, *e.g.*, *Resident Advisory Bd.* v. *Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978) ("The Supreme Court has noted the need to construe both Title VII and Title VIII broadly so as to end discrimination."). In particular, the Supreme Court has broadly construed standing requirements under Title VIII to extend to the full limits of Article III. See, *e.g.*, *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 109 (1979); *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 372-375 (1982) (black individual had standing to sue in her capacity as a "tester"). Recognition of the nonapplicant's claim, in appropriate circumstances, plainly furthers a broad remedial purpose.

4. Defendant's argument (Br. 27-39)[14] that the futile act theory is inapplicable to the instant case is based almost entirely on distinguishing the underlying facts in *Teamsters* from those in this case. Defendant emphasizes, for example, that *Teamsters* was a class action addressing the scope of relief, and involved a different statute and incumbent employees (Br. 29-30). Defendant does not, however, explain why any of these differences matter,[15] or address the subsequent cases that have applied the theory in actions by individuals and to establish liability, situations analogous to that in the instant case.[16] These cases plainly refute defendant's

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[14] "Br. ——" refers to the page number in appellant's opening brief.

[15] Defendant's chief contention is that *Teamsters* is inapposite because of the nature of the plaintiffs—in *Teamsters* they were employees "who had an established relationship with defendant" (Br. 32), whereas in the instant case plaintiff had no relationship with the cooperative. This distinction is irrelevant, however, to whether, as a general matter, the principles that support a nonapplicant's claim of employment discrimination also apply to a nonapplicant's claim of housing discrimination. The relationship between the plaintiff and the defendant simply concerns whether, as a factual matter, plaintiff can meet the *Teamsters* test. See pages 5-6, *supra*. Moreover, the futile act theory enunciated in *Teamsters* would surely apply where, for example, the defendant put up a sign saying "Blacks Need Not Apply."

[16] The only case that defendant cites other than *Teamsters* is *Gay* v. *Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531 (9th Cir. 1982). To support its assertion that the principle in *Teamsters* "has only very limited application to situations essentially peculiar to that which existed in *Teamsters*," defendant states (Br. 36) that the court in *Gay* did not apply the futile act theory in determining that plaintiffs, who did not formally apply for the positions sought, did not establish a prima facie case of employment discrimination. Defendant, however, wholly misstates *Gay*. The court in *Gay* in fact concluded that plaintiffs did not establish the "necessary prerequisite" for reliance on the futile act theory, *i.e.*, that the employer had a "consistently enforced discriminatory policy which discourages applicants from even attempting to apply." *Id.* at 546 (internal quotation omitted, citing *Teamsters*). Thus, the

crabbed reading of *Teamsters*.[17]

B. *The District Court Properly Articulated the Elements of Proof Under the Futile Act Theory*

The Supreme Court in *Teamsters* set forth a two-part test the nonapplicant must meet to establish that she was a victim of discrimination: that she would have applied but for the discrimination, and that had she applied she would have been discriminatorily rejected. 431 U.S. at 368 n.52. In the instant case, the district court properly articulated the elements of proof necessary to meet this test, where, as here, the potential applicant learned of the discrimination from an unaffiliated third party.

1. With respect to the first part of this test, the court must determine whether the usual requirement of application is inappropriate because the plaintiff would have applied but for the discrimination that made such application futile. As an initial matter, the court must determine whether the plaintiff was genuinely interested in the position or opportunity. If she was, the crucial inquiry, as the district court recognized, is whether the nonapplicant was justified in believing that application would

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court in *Gay* did not find that the futile act theory was, as a general matter, inapplicable to plaintiffs' claim; the court, indeed, applied *Teamsters*, and concluded that plaintiffs' proof was insufficient to invoke the theory. The decision in *Gay*, therefore, in no way limits the reach of *Teamsters*.

[17] We note that defendant makes a related argument that plaintiff lacked standing to bring her claims under Sections 1981 and 1982 (Br. 14-22). Defendant chiefly contends that plaintiff did not suffer an injury in fact traceable to its conduct. We agree with the reasoning of the district court that implicit in a finding of liability under the futile act theory is the conclusion that plaintiff was injured and, therefore, has standing to sue (689 F. Supp. at 548 n.7; App. 328 n.7). See, *e.g.*, *Pime* v. *Loyola University of Chicago*, 803 F.2d 351, 353 (7th Cir. 1986) ("Even though appellant did not formally apply for a tenure track position no standing question arises. One does not have to apply for a job when it is obvious that it would be a futile act" (citing *Teamsters*).).

have been futile (689 F. Supp. at 554; App. 343-344). If the potential applicant does not have a reasonable basis for believing that the existence of discrimination makes applying a futility, there is an insufficient link between plaintiff's decision not to apply and the discrimination to render plaintiff a victim of the discrimination.

As the district court also correctly recognized, in determining whether the plaintiff was justified in believing that her application would be futile, the court must examine whether plaintiff could reasonably regard her source as reliable (689 F. Supp. at 554; App. 343-344). This inquiry may be relatively simple where the nonapplicant has learned directly from the employer that her application would be futile. Where, however, as here, the source is a third party, the court properly recognized that the relevant inquiry is whether the third party (here, the real estate agent) was someone the plaintiff "could naturally be expected to rely on for information regarding [defendant's] discriminatory housing policy" (689 F. Supp. at 554; App. 344).[18]

2. In applying the second part of the *Teamsters* test—determining whether the plaintiff would have been discriminatorily rejected had she applied—the district court properly examined the evidence to determine whether the defendant discriminated against a protected class.[19]

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[18] The information source may be, of course, a third party. It is the discrimination itself, and not plaintiff's knowledge of it, that must come from the defendant. Again, the first part of the *Teamsters* test simply focuses on whether plaintiff had a good reason for not applying. Further, as the district court suggested, the plaintiff need not establish how the third party received his information (689 F. Supp. at 554; App. 343). That question has no independent significance once the nonapplicant establishes that she reasonably regarded the information source as reliable, thereby justifying her decision to forego applying.

[19] The instant case rests on defendant's alleged policy of discrimination against blacks, proof of which is central to the second part of the *Teamsters* test. See page 5, *supra*. Plaintiff need not

In the instant case, plaintiff was clearly within the protected class.

CONCLUSION

For the reasons set forth above, this Court should hold that the futile act theory, as enunciated in *Teamsters* v. *United States*, 431 U.S. 324 (1977), is applicable in housing discrimination cases to establish a cause of action for an individual who seeks housing but does not formally apply because she reasonably believes it would be futile in the face of discrimination.

Respectfully submitted,

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necessarily show that there was a "policy" of discrimination, however, in every case in which the futile act theory is applied, although in most cases that will be the only way to show that the plaintiff would have been rejected had she applied. Where, for example, the plaintiff was told by a prospective employer that she will not get the job because she is black, and plaintiff can prove that, defendant's response that it has hired a number of blacks would not preclude plaintiff from satisfying the threshold *Teamsters* test.